

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

FRANK EVANEGA)	
Claimant)	
VS.)	
)	Docket No. 268,976
AMERICAN BONANZA SOCIETY)	
Respondent)	
AND)	
)	
CONTINENTAL WESTERN INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the December 19, 2002 Review and Modification Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on May 16, 2003. Stacy Parkinson of Olathe, Kansas, was appointed Board Member Pro Tem to participate in this claim.

APPEARANCES

Dale V. Slape of Wichita, Kansas, appeared for claimant. Kirby A. Vernon of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the December 19, 2002 Review and Modification Award and the March 26, 2002 Agreed Award.

ISSUES

This is a claim for a July 23, 2001 accident and resulting low back injury. In a March 26, 2002 Agreed Award, claimant was granted benefits for a 3.5 percent permanent partial general disability, which was based upon claimant's whole body functional impairment rating. On April 1, 2002, respondent terminated claimant. Consequently, claimant initiated this request for review and modification of the Agreed Award.

In the December 19, 2002 Review and Modification Award, Judge Frobish denied claimant's request to increase his permanent partial general disability to a work disability (a permanent partial general disability greater than the functional impairment rating).

Claimant contends Judge Frobish erred. Claimant argues that he made a good faith effort to retain his employment with respondent and that he is presently making a good faith effort to find work. Accordingly, claimant requests the Board to find that he has sustained a 100 percent wage loss and a 21 percent task loss for a 60.5 percent work disability.

Conversely, respondent and its insurance carrier contend claimant was terminated for poor job performance and, therefore, claimant's pre-injury wage should be imputed for purposes of the wage loss prong of the permanent partial general disability formula. They also argue that claimant has no task loss as a result of the July 2001 back injury. Thus, respondent and its insurance carrier argue claimant's request for an increased permanent partial general disability rating should be denied.

The only issue before the Board on this appeal is whether claimant is now entitled to receive a work disability as a result of his discharge from respondent's employment.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In July 2000, claimant began working for respondent, which is an association of individuals who own or operate Beechcraft Bonanzas, Barons and Travelairs. Before that time, claimant worked in customer support for Raytheon Aircraft and its predecessor Beechcraft for 20½ years. Respondent hired claimant for his vast experience with the older Beechcraft airplanes.
2. On July 23, 2001, while roping off a display airplane that respondent had flown to an air show, claimant injured his back using a fence post driver. The parties stipulated that claimant's accident arose out of and in the course of employment with respondent.
3. Claimant received medical treatment from Dr. Ronald B. Davis who eventually released claimant to return to work with a 60-pound weight restriction. Dr. Davis, who treated claimant from September 2001 through November 2001, referred claimant to a surgeon for a consultation and was advised that claimant was not a surgical candidate. Dr. Davis' final diagnosis was chronic lumbar back sprain with left leg pain.

4. At his attorney's request, claimant was also evaluated in January 2002 by Dr. Frederick R. Smith, who recommended that claimant restrict his single lifts to no more than 40 pounds and restrict his occasional lifting to only 20 pounds. Dr. Smith, who diagnosed lumbosacral sprain or strain with mechanical back pain perhaps from a disk or facet, also recommended that claimant not sit for more than half an hour at a time and that he alternate sitting and standing. Moreover, the doctor testified that claimant may need to recline one or two times per day for 10 to 15 minutes.
5. Following the accident, claimant continued to work for respondent. In March 2002, the parties entered into an Agreed Award in which claimant received a 3.5 percent permanent partial general disability based upon an estimate of claimant's permanent whole body functional impairment. Claimant worked for respondent until he was fired in April 2002 allegedly for lack of performance and being unable to follow directions.
6. As indicated above, in July 2000 claimant began working for respondent. Respondent hired claimant as its aircraft technical manager, who was in charge of all the technical activities concerning the airplanes, including operations and maintenance. Respondent hired claimant expecting him to expand current programs and develop new programs for its members. Respondent also expected claimant to speak at conventions, put on seminars, and write articles for its monthly magazine.
7. Not long after claimant began his job, conflicts emerged between respondent's executive director, Nancy Johnson, and claimant. In short, the executive director was not happy with claimant's job performance. In February 2001, the executive director sent a memorandum to a member of respondent's board of directors citing some concerns regarding claimant's performance. In February 2001, the executive director spoke to claimant about those concerns. On July 17, 2001, the executive director gave claimant a negative review and further discussed some of respondent's expectations.
8. The relationship between claimant and the executive director became even more strained with claimant's July 23, 2001 back injury. In early August 2001, claimant contacted a business acquaintance and advised that he would be leaving respondent's employment around the first of October 2001 to pursue contracting and consulting work.
9. As stated above, the parties entered into an Agreed Award in March 2002 in which claimant was awarded permanent partial general disability benefits for a 3.5 percent

whole body functional impairment. Shortly afterwards, on April 1, 2002, respondent terminated claimant allegedly for failing to satisfactorily perform his job.

CONCLUSIONS OF LAW

The Workers Compensation Act provides that a worker may seek to modify an award of benefits when there are changed circumstances.¹ Here, claimant contends that he is entitled to receive a work disability because he is no longer working for respondent.

The 3.5 percent permanent partial general disability that claimant received in the Agreed Award was limited to claimant's whole body functional impairment because he returned to work for respondent following his July 2001 accident earning a comparable wage. The issue now presented is whether claimant's permanent partial general disability should be increased following April 1, 2002, due to his termination from respondent's employment. Permanent partial general disability is defined in K.S.A. 44-510e, which provides:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

¹ See K.S.A. 44-528.

But that statute must be read in light of *Foulk*² and *Copeland*.³ In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wage being earned when the worker fails to make a good faith effort to find appropriate employment after recovering from the work injury.

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .⁴

The Kansas Court of Appeals in *Watson*⁵ held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it.⁶

It is claimant's burden to prove that he has made a good faith effort to find or retain appropriate employment. This is a very close case. But, considering the entire record, the Board concludes that claimant has failed to prove that he made a good faith effort to retain his employment with respondent. Conversely, the greater weight of the evidence indicates that claimant failed to commence and complete the work for which he was hired. Accordingly, claimant's conduct is tantamount to refusing to work and, therefore, the salary that he was receiving from respondent should be imputed for the post-injury wage in the wage loss prong of the permanent partial general disability formula. As claimant's wage

² *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

³ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁴ *Id.* at 320.

⁵ *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

⁶ *Id.* at Syl. ¶ 4.

loss is deemed to be less than 10 percent, his permanent partial general disability is limited to the functional impairment rating as determined in the Agreed Award.

Claimant has failed to establish that he is entitled to receive a work disability. Consequently, the Judge properly denied claimant's request to increase his award of permanent partial general disability benefits.

At the regular hearing, respondent and its insurance carrier offered a June 2002 Decision that was entered in an unemployment proceeding initiated by claimant. Claimant's attorney timely objected to the document. The Board concludes that the document comprises hearsay evidence that should not be considered as part of the record in this claim.

AWARD

WHEREFORE, the Board affirms the December 19, 2002 Review and Modification Award entered by Judge Frobish.

IT IS SO ORDERED.

Dated this ____ day of June 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director